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No. 88-603

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

STATE OF ARIZONA,

Petitioner,

-vs-

CONRAD MARION FLINT,

Respondent,

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS

FREDRIC F. KAY
Federal Public Defender
District of Arizona

JON M. SANDS
Asst. Federal Public Defender
320 North Central Avenue
Suite 200
Phoenix, Arizona 85004
Telephone: FTS 261-3561

Attorneys for RESPONDENT

QUESTION PRESENTED

Can the State of Arizona have concurrent jurisdiction with the federal government to prosecute a non-Indian for a criminal offense committed against an Indian occuring on the Navajo Indian reservation?

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OPINION BELOW

The Arizona Court of Appeals' opinion held that federal criminal jurisdiction is exclusive over alleged crimes committed by a non-Indian against Indians on an Indian reservation. State v. Flint, 157 Ariz. 227, 756 P.2d 324 (Ct.App. 1988). The bases of the holding were (1) this Court's clear statement in Williams v. United States, 327 U.S. 711, 714 (1946) that "the laws and courts of the United States, rather than those of Arizona, have jurisdiction over offenses committed [on the reservation] by one who is not an Indian against one who is an Indian"; and (2) in light of the congressional intent to preserve exclusive federal jurisdiction unless affirmatively and unequivocally relinquished.

JUDGMENT SOUGHT TO BE REVIEWED

The respondent, Conrad Marion Flint, defendant-appellee in the court below, respectfully prays that the Petition for Writ of Certiorari to the Court of Appeals for the State of Arizona docketed on September 8, 1988 be denied.

JURISDICTION

The Supreme Court of Arizona denied review of this case on July 13, 1988. The petition was timely filed within sixty days of the Arizona Supreme Court's order denying the state's petition for review. This Court returned the petitien as its appendix was printed improperly. The corrected petition then was timely filed within twenty-one days of receipt of the return petition.

The jurisdiction of this Court was invoked under U.S. Const. art. III, §2, 28 U.S.C. §1254(1), and United States Supreme Court Rule 20.1.

CONSTITUTIONAL PROVISIONS, STATUTES, AND TREATIES INVOLVED

The applicable statutes and treaties are the same as reproduced in petitioner's brief.

STATEMENT OF FACTS

Respondent accepts petitioner's rendition of the factual background. Respondent wishes to add that he is presently serving a sentence of imprisonment at the Federal Correctional Institute in Sandstone, Minnesota as a result of a federal conviction for the same acts which are the basis of this petition.

REASONS FOR DENYING THE PETITION

I. Because of the Currently Existing Exclusive Jurisdiction Vested with the Federal Government, the State of Arizona has no Jurisdiction to Prosecute a Non-Indian for a Criminal Offense Committed Against an Indian Occuring on the Navajo Indian Reservation.

The decision of the Court of Appeals of the State of Arizona upholding exclusive federal jurisdiction for alleged crimes committed by a non-Indian against Indians on a reservation is neither in conflict with federal law, nor the decisions of this Court nor of any federal circuit court of appeals. Indeed, the decision clearly conforms with both federal law and prior precedent in protecting what is recognized as important federal and tribal issues. 18 U.S.C. §1162; 25 U.S.C. §1321; Williams v. United States, 327 U.S. 711 (1946). A granting of certiorari therefore is unwarranted.

The State of Arizona however seeks to have this Court create an exception to the established policy of exclusive federal jurisdiction over non-Indians committing crimes against Indians. Arizona looks for support to United States v. McBratney, 104 U.S. 621 (1882), which established an exception for crimes committed by non-Indians against other non-Indians on reservation land. The rational for this exception, that there is no tribal or federal interest where neither the offender nor the victim are Indians, cannot be extended to permit concurrent state jurisdiction in the instance involving a non-Indian offender allegedly committing crimes against Indians on the reservation. The Court of Appeals'

decision effectively refutes Arizona's argument.

In its opinion, the Arizona Court of Appeals considered Williams v. United States, 327 U.S. at 714, where this Court dealt with whether a non-Indian man who was accused of having carnal knowledge of an underage Indian girl could be prosecuted under a state statute pursuant to the Assimilative Crimes Act, 18 U.S.C. §13 and the General Crimes Act (now codified at 18 U.S.C. §1152). At the outset in Williams, this Court articulated the special relationship existing between Indians and the federal government that resulted in exclusive federal jurisdiction. As this Court unequivocally stated:

> While the laws and courts of the State of Arizona may have jurisdiction over offenses committed on this reservation between persons who are not Indians, the laws and courts of the United States, rather than those of Arizona, have jurisdiction over offenses committed there, as in this case, by one who is not an Indian against one who is an Indian.

Id. at 714 (quoted in State v. Flint, ___ Ariz. ___, 756 F.2d 324, 325 (Ariz. App. 1988). This Court then went on to hold that the Assimilative Crimes Act was inapplicable where Congress had specifically enacted legislation.

As the Arizona Court of Appeals acknowledged, nothing in the forty years since Williams has changed this broad principle. Indeed, the principle articulated in Williams itself was the result of this Court's long awareness of the special federal status Indians enjoy as wards of the nation. E.g., Donnelly v. United States, 228 U.S. 243 (1913) (federal jurisdiction when a

non-Indian kills an Indian on reservation); United States v. Kagama, 118 U.S. 375 (1885) (same). This has also been the view of recent Federal Court of Appeals cases that specifically state that federal criminal jurisdiction is exclusive for crimes committed in Indian country affecting Indians as either defendants or victims. Langley v. Ryder, 778 F.2d 1092 (5th Cir. 1985); United States v. Torres, 733 F.2d 449 (7th Cir.), cert. denied, 469 U.S. 864 (1984).

The Arizona Court of Appeals' opinion is further bolstered by its examination of congressional intent, which strongly supported its position of exclusive federal jurisdiction. Pursuant to Pub. L. 83-280 (18 U.S.C. §1162; 25 U.S.C. §1321), Congress had granted certain states (Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin) the power to assume jurisdiction of criminal and civil offenses committed on Indian reservations. It also allowed the assumption of Indian jurisdiction by any other states that desired to do so. To receive such jurisdiction, the state just had to say "yes" through affirmative legislation. Congress further consented to allow required amendment of any state constitution that contained disclaimers of jurisdiction over Indian lands, such as the Arizona Enabling Act. Arizona did not avail itself of this opportunity. Indeed, Arizona specifically declined. See generally Clinton, Criminal Jurisdiction Over Indian Lands: A Journey through a Jurisdictional Maze, 18 Ariz. L. Rev. 503 (1979). Arizona, in short, made an affirmative decision not to exercise jurisdiction

over Indian lands.

Against this background, Arizona now lamely suggests that this Court should carve out an exception to exclusive federal jurisdiction which permits concurrent state jurisdiction because of a purported lack of federal and tribal interest when a non-Indian offender commits a crime against an Indian on the reservation. The state looks to United States v. McBratney, 104 U.S. 621 (1882), which, as stated above, concerns non-Indians committing crimes against other non-Indians. McBratney in an anomaly to exclusive federal jursidiction on Indian reservations because it involved soellyy non-Indians. That is not the case here, where there are Indian victims. The state attempts to finesse this by arguing that Indian and federal interests are not impinged. In so arguing, the state's attempted prosecutorial reach outstrips its jurisdictional grasp.

In the present case, both the Indian tribe and the federal government have a very strong interest in maintaining jurisdiction. The defendant is charged with sexual crimes against Indian youths, which surely is an Indian matter. Moreover, as noted in Williams, federal jurisdiction is especially applicable "with respect to crimes committed by white men against the persons or property of Indian tribes while occupying reservations . . . ." 327 U.S. at 714. Indeed, the strong federal interest has led to a federal prosecution of respondent which has resulted in a conviction and a lengthy federal prison sentence. There is, therefore, no true state interest that needs vindication.

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Essentially Arizona wishes to oust exclusive federal jurisdiction over reservations for non-Indians committing crimes against Indians for the simple fact that it feels that respondent should be punished even more. This is not a valid reason for the granting of certiorari.

CONCLUSION

Because the Arizona Court of Appeals' decision in this case is neither in conflict with existing federal law nor with the decision of this Court nor those of the federal circuit courts and, further, because the Arizona Court of Appeals' decision conforms with stated tribal and federal interest in exclusive criminal jurisdiction over non-Indians committing crimes against Indians on the reservation, the State of Arizona's Petition for Writ of Certiorari should be denied.

Respectfully submitted: November 14, 1988

FREDRIC F. KAY
Federal Public Defender
District of Arizona

FREDRIC F. KAY
Federal Public Defender

JON M. SANDS
Asst. Federal Public Defender

CERTIFICATE OF MAILING - DELIVERY

STATE OF ARIZONA)
) ss:
County of Maricopa)

JON M. SANDS, Assistant Federal Public Defender, District of Arizona, Phoenix, Arizona, being first duly sworn, upon his oath, deposes and says:

That two copies of Brief in Opposition to Petition for Writ of Certiorari to the Arizona Court of Appeals have this 14th day of November, 1988, been mailed to Paul J. McMurdie, Assistant Attorney General, Department of Law, 1275 West Washington, Phoenix, Arizona 85007; and a copy mailed to Conrad Flint, Reg. No. 20008-008, FCI, Sandstone, Minnesota 55072.

JON M. SANDS
Asst. Federal Public Defender

SUBSCRIBED AND SWORN to before me this 14th day of November, 1988, by Jon M. Sands.

Notary Public

My Commission Expires:
My Commission Expires June 6, 1990

APPENDIX

these sources, but may extend to the entire record to determine what defendant "knew from any source." *Crowder*, 155 Ariz. at 479, 747 P.2d 1178. *Crowder* further establishes that *Phillips* violations are not properly addressed for the first time on appeal, but rather should be submitted to the trial court by a petition for post-conviction relief. *Crowder*, at 479, 747 P.2d at 1178; *see* Rule 32.1, Arizona Rules of Criminal Procedure.

Accordingly, pursuant to *Crowder*, we retract our initial determination to vacate the judgment and sentence of the trial court. Instead, we affirm the trial court's judgment and sentence, leaving it to the defendant to pursue the restitution issue by petition for post-conviction relief if he so chooses.

Affirmed.

CONTRERAS, P.J., and GREER, J., concur.

157 Ariz. 227

STATE of Arizona, Appellant,

v.

Conrad Marion FLINT, Appellee.

No. 1 CA–CR 10650.

Court of Appeals of Arizona,
Division 1, Department B.

Jan. 19, 1988.

Review Denied July 2, 1988.

Non-Indian was indicted of oral sexual conduct with and commercial exploitation of Indian minors on reservation. The Superior Court, Navajo County, Cause Nos. CR–9095 and CR–9129, John L. Claborne, J., dismissed indictments. State appealed. The Court of Appeals, Greer, J., held that State lacked criminal jurisdiction over crimes that non-Indian allegedly committed against Indians on reservation.

Affirmed.

Indians ⇐38(2)

State lacked criminal jurisdiction over crimes that non-Indian allegedly committed against Indians on reservation, but federal jurisdiction was exclusive. 18 U.S.C.A. §§ 1152, 1153, 1162; A.R.S. Const. Art. 20, par. 4; 28 U.S.C.A. § 1360.

Robert K. Corbin, Atty. Gen. by William J. Schafer III, Chief Counsel, Crim. Div., and Paul J. McMurdie, Asst. Atty. Gen., Phoenix, for appellant.

David J. Martin, Navajo County Public Defender, Holbrook, for appellee.

OPINION

GREER, Judge.

Appellee Flint was charged by indictment in Navajo County with four counts of oral sexual contact with a minor and four counts of commercial sexual exploitation of a minor. In a separate indictment, he was charged with six counts of oral sexual contact with a minor and two counts of commercial sexual exploitation of a minor. Since the jurisdiction issue was not raised at trial by either party, the trial judge requested memoranda and oral argument. On July 30, 1986, the court heard oral argument on the issue of jurisdiction and, on August 7, 1986, ruling that it did not have jurisdiction, ordered dismissal of both indictments. The state filed a timely notice of appeal from the dismissal.

The only question the state raises on appeal is whether the trial court erred by dismissing the action on the grounds that the state court has no criminal jurisdiction where a non-Indian allegedly commits a crime against an Indian on the reservation. The state does not deny federal jurisdiction, but argues, without supporting authority, that the state and federal courts have concurrent jurisdiction. Defendant, on the other hand, argues that federal jurisdiction is exclusive. We agree with defendant's position.

The Indian Country Crimes Act, 18 U.S.C. § 1152, provides:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.
>
> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

The terms of this act include all offenses by non-Indians in Indian country. *See* F. Cohen, *Handbook of Federal Indian Law* 298 (1982 ed.) (Cohen). The United States Supreme Court carved out an exception to 18 U.S.C. § 1152 for offenses committed by non-Indians against non-Indians within Indian country. *United States v. McBratney*, 104 U.S. (14 Otto) 621, 26 L.Ed. 869 (1881). However, criminal offenses by non-Indians against Indians or their property remain subject to federal jurisdiction pursuant to the Indian Country Crimes Act. "The Supreme Court has stated that federal court jurisdiction under this Act is exclusive of state court jurisdiction." Cohen, at 353, *citing Williams v. Lee*, 358 U.S. 217, 220 n. 5, 79 S.Ct. 269, 270 n. 5, 3 L.Ed.2d 251 (1959); *Williams v. United States*, 327 U.S. 711, 714, 66 S.Ct. 778, 779–80, 90 L.Ed. 962 (1946).

> The general rule *outside Indian affairs* is that the state and federal governments may separately punish the same conduct. *Abbate v. United States*, 359 U.S. 187 [79 S.Ct. 666, 3 L.Ed.2d 729] (1959). In certain areas Congress has preempted state jurisdiction. *E.g., Pennsylvania v. Nelson*, 350 U.S. 497 [76 S.Ct. 477, 100 L.Ed. 640] (1956). *Indian affairs has long been an area of broad federal preemption, see* [Cohen, Ch. 5, Sec. B] and that factor alone is sufficient to conclude that the states cannot punish Indian defendants in Indian country. *See United States v. Kagama*, 118 U.S. 375 [6 S.Ct. 1109, 30 L.Ed. 228] (1886). When a defendant is not Indian, traditional law from other fields might suggest that concurrent state and federal jurisdiction exists. But this traditional assumption is based on the typical situation where the state and federal governments seek to vindicate distinct governmental interests. The assumption has not been tested where both governments might seek to punish the same common law felony; in those circumstances, concurrent jurisdiction would be particularly troublesome. The potential for this problem arises in federal enclaves under concurrent jurisdiction. *See United States v. State Tax Comm'n*, 412 U.S. 363 [93 S.Ct. 2183, 37 L.Ed.2d 1] (1973). Congress is aware of this problem, and current drafts of a revised federal criminal code propose that federal court jurisdiction over concurrent enclaves would be deemed preemptive over common law felonies but not other crimes. *See* S. 1722, 96th Cong., 2d Sess. § 206 (1979). These considerations suggest that the exclusive jurisdiction ... is correct, but there may be concurrent state jurisdiction over a non-Indian defendant when there are victims of both races or in the class of "victimless" cases ...

Cohen, at 353 n. 44 (emphasis added).

In *Williams v. United States*, 327 U.S. 711, 714, 66 S.Ct. 778, 780, 90 L.Ed. 962 (1946), a non-Indian man was accused of having sexual intercourse with an underage Indian girl on the reservation; the United States Supreme Court preliminarily noted:

> While the laws and courts of the State of Arizona may have jurisdiction over offenses committed on this reservation between persons who are not Indians, *the laws and courts of the United States, rather than those of Arizona, have jurisdiction over offenses committed there, as in this case, by one who is not an Indian against one who is an Indian.*

(Emphasis added.)

The state suggests that this language is mere dicta, unnecessary to sustain the

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judgment of the court. *Arizona Corp. Comm'n v. Mountain States Tel. & Tel. Co.*, 71 Ariz. 404, 228 P.2d 749 (1951). In *Williams*, the United States Supreme Court had to consider its own jurisdiction, but it did not have to consider whether Arizona and the federal courts had concurrent jurisdiction. While the language of *Williams* may have been dicta, it has not been seriously questioned. Cohen, at 353.

Williams cited *Donnelly v. United States*, 228 U.S. 243, 33 S.Ct. 449, 57 L.Ed. 820 (1913), which held that federal courts have jurisdiction where a non-Indian kills an Indian on a reservation within state boundaries, as the basis for the above-quoted proposition. *Donnelly* emphasized the protective purpose of federal jurisdiction and, in turn, cited *United States v. Kagama*, 118 U.S. 375, 383, 6 S.Ct. 1109, 1113, 30 L.Ed. 228 (1886), which found exclusive federal jurisdiction where both the defendant and the victim were Indian because "the Indian tribes are the wards of the nation." *Donnelly* held that the ward rationale supporting exclusive federal jurisdiction applied "perhaps *a fortiori*—with respect to crimes committed by white men against the person or property of the Indian tribes while occupying reservations set apart for the very purpose of segregating them from the whites and others not of Indian blood." 228 U.S. at 271–72, 33 S.Ct. at 459.[1]

Learned commentators on Indian law have also supported the result reached here. Cohen, at 298, states that *Donnelly* has consistently been followed and exclusive federal jurisdiction obtains where a non-Indian harms an Indian. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey through a Jurisdictional Maze*, 18 Ariz.L.Rev. 503, 523 n. 94 (1976), noted that "[t]he prevailing rule today is that the federal jurisdiction conferred by [U.S.C.] sections 1152 and 1153 is exclusive; where one of these sections applies, the state has no jurisdiction."

Two recent federal court of appeals cases specifically state that federal criminal jurisdiction is exclusive over crimes committed in Indian country affecting an Indian as either the defendant or victim. In *United States v. Torres*, 733 F.2d 449 (7th Cir.), *cert. denied*, 469 U.S. 864, 105 S.Ct. 204, 83 L.Ed.2d 135 (1984), the defendant Indians were charged with the murder of a non-Indian. The defendants argued that the conspiracy to commit the murder and kidnapping occurred on state land; therefore, jurisdiction lay in state court. The Seventh Circuit Court disagreed.

> It is equally clear, however, that *under 18 U.S.C. § 1152, the federal court has exclusive jurisdiction* to punish an Indian who participates in a conspiracy to murder a non-Indian within the federal territory of the Menominee Indian Reservation, provided that the Indian has not been punished by the tribe and the crime is not in the exclusive jurisdiction of the tribe....

733 F.2d at 459 (emphasis added).

Langley v. Ryder, 778 F.2d 1092 (5th Cir.1985), generally held:

> *Once land is determined to be Indian country, state criminal jurisdiction is preempted by both federal protection of tribal self-government and federal statutes on subjects relating to Indians, tribes, their property and federal programs* [citation omitted]. Federal protection of tribal self-government precludes criminal jurisdiction of state courts over Indians on their property absent the consent of Congress. [Citation omitted.] *In order for a state to exercise criminal jurisdiction within Indian country there must be clear and unequivocal grant of that authority.*

1. There is little case law on the subject, probably because the issue has been thought to be well-settled. In several cases involving Indians or Indian reservations where there has been a question of jurisdiction, the courts have noted the general scheme for criminal jurisdiction over crimes committed on the reservation and have stated that, absent federal law to the contrary, where non-Indians commit crimes against Indians on a reservation, they are subject to *federal* jurisdiction. *E.g., Mull v. United States*, 402 F.2d 571 (9th Cir.1968); *United States v. John*, 587 F.2d 683, 686 (5th Cir.1979); *United States v. Johnson*, 637 F.2d 1224 (9th Cir.1980).

778 F.2d at 1095–96 (emphasis added). The Fifth Circuit Court noted that, pursuant to Pub.L. 83–280 (25 U.S.C. § 1321), Congress granted certain states the power to exercise criminal jurisdiction within Indian land, but held that, because "Louisiana is not a P.L. 280 state, there is no effective Congressional grant of jurisdiction to Louisiana within Indian country. Thus the general rule that the federal, not the state government, has criminal jurisdiction over Indian lands applies." *Id.* at 1096.

We find the cases discussing state criminal jurisdiction pursuant to acts of Congress or Pub.L. 83–280 persuasive. Pub.L. 83–280 specifically grants certain states broad criminal jurisdiction over offenses committed by or against Indians on Indian land within state boundaries. *See* 18 U.S.C. § 1162(a) (Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin were expressly granted criminal jurisdiction over offenses committed within specified Indian country). Congress has also made separate grants of state criminal jurisdiction to individual states. For example, 18 U.S.C. § 3243 specifically authorized Kansas to have concurrent criminal jurisdiction with the federal courts over Indian reservations in that state. *See Iowa Tribe of Indians v. Kansas*, 787 F.2d 1434 (10th Cir.1986). *See also, California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987); *State v. Hoodie*, 588 F.2d 292 (9th Cir.1978); *Arquette v. Schneckloth*, 56 Wash.2d 178, 351 P.2d 921 (1960).

Pub.L. 83–280 further allowed unnamed states to assume criminal jurisdiction over Indian lands within their borders if they met certain requirements and obtained the consent of the tribe over which they desired jurisdiction. Pub.L. 90–284, Title IV, § 401, Apr. 11, 1968, 82 Stat. 78; *Langley v. Ryder*, 733 F.2d at 1096. Section 6 of the Act of Aug. 15, 1953, c. 505, 67 Stat. 590 [Pub.L. 83–280], provided that:

> [n]otwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act [adding section 1360 of this title and section 1162 of Title 18]: Provided, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.

In Section 7, Congress gave consent to any other state not having criminal and/or civil jurisdiction to assume jurisdiction at the time and in the manner the people of that state, by legislative action, obligate and bind the state to do so.[2]

Section 20 of Arizona's Enabling Act, Act June 20, 1910, c. 310, 36 Stat. 557, 568–579, provides in pertinent part:

> [t]hat the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by an Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the

2. That part of Pub.L. 83–280 which permitted assumption of civil and/or criminal jurisdiction by states not having such was repealed by Pub. L. 90–284, Title IV, § 403(b), Apr. 11, 1968, 82 Stat. 79. This repeal was not to affect any cession of jurisdiction made pursuant to 18 U.S.C. § 1162 (criminal jurisdiction) or 28 U.S.C. § 1360 (civil jurisdiction) prior to repeal. However, the repeal did close the door on any subsequent cession of civil or criminal jurisdiction to the states under either statute. *See also, Langley v. Ryder*, 602 F.Supp. 335, 344 (W.D.La.), *aff'd*, 778 F.2d 1092 (5th Cir.1985).

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absolute jurisdiction and control of the Congress of the United States; ...

Ariz. Const. art. 20, para. 4, adopts virtually identical language.[3]

Under A.R.S. § 36-1801, Arizona has assumed jurisdiction over Indian lands pursuant to Pub.L. 83-280 for the limited purpose of enforcing air pollution control laws.[4] However, Congress has not made an express grant of state criminal jurisdiction over the Navajo reservation,[5] nor has the state assumed such jurisdiction in accordance with Pub.L. 83-280. Moreover, the time for the state to assume either civil or criminal jurisdiction has passed.[6] Consequently, it would be inappropriate for this court to redefine Arizona's criminal jurisdiction when such jurisdiction is obviously a matter of federal legislative concern.

The United States Supreme Court held that 18 U.S.C. § 1153, which allocates jurisdiction between the federal and tribal courts in cases of crimes between Indians on Indian land, does not allow for concurrent state jurisdiction in such cases. *United States v. John*, 437 U.S. 634, 98 S.Ct. 2541, 57 L.Ed.2d 489 (1978). If concurrent state jurisdiction does not exist under 18 U.S.C. § 1153, it seems likely that a similar result should obtain under 18 U.S.C. § 1152.

State v. Burrola, 137 Ariz. 181, 669 P.2d 614 (App.1983), can be distinguished and is of no aid to the state. In *Burrola*, this court found that the state had jurisdiction where a non-Indian committed a victimless crime on the Indian reservation. The court first noted the long-established exception to exclusive federal jurisdiction which provides for exclusive state jurisdiction over crimes committed by non-Indians against non-Indians, even though on the reservation. *McBratney*, 104 U.S. (14 Otto) 621; *State v. Griswold*, 101 Ariz. 577, 578, 422 P.2d 693, 694 (1967). The rationale for this exception is that such crimes do not involve essential tribal relations or affect the rights of Indians. *Burrola*, 137 Ariz. at 182, 669 P.2d at 615. This court found the same reasoning applicable where a non-Indian commits a victimless crime on an Indian reservation.

By contrast, in a situation such as this, both the Indian tribe and the federal government, which acts as the Indians' guardian, have a very strong interest. The appellee here is charged with serious sexual crimes against several young Indian males, thus creating a strong tribal interest. In this respect, this case is similar to *Williams v. United States*, 327 U.S. 711, 66 S.Ct. 778, 90 L.Ed. 962, where the non-Indian defendant was charged with having sexual contact with an underage Indian female. Further, in *Williams*, the court noted that federal jurisdiction was especially applicable "with respect to crimes committed by white men against the persons or property of Indian tribes while occupying reservations...." 327 U.S. at 714, 66 S.Ct. at 780, *citing Donnelly*, 228 U.S. 243, 33 S.Ct. 449.

3. Article I of the treaty between the United States Government and the Navajo Indian Tribe also provides.

> If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also to reimburse the injured persons for the loss sustained.

Treaty of 1868, August 12, 1868, art. I, 15 Stat. 667; Navajo Trib.Code, App., at 9 (1978). *Cf. United States v. Superior Court In & For Maricopa County*, 144 Ariz. 265, 697 P.2d 658 (1985).

4. Section 36-1801 was renumbered as A.R.S. § 49-561 by Laws 1986, ch. 368, § 39, effective July 1, 1987.

5. Congress has expressly given Arizona criminal and civil jurisdiction over the Pascua Yaqui Indian reservation. 25 U.S.C. § 1300f(c). However, it is not clear whether such delegation is still effective in the face of the Arizona Governor's attempted retrocession of jurisdiction and Ariz. Const. art. 20, para. 4, which disclaims any jurisdiction over Indians or their land. *See Val/Del, Inc. v. Superior Court*, 145 Ariz. 558, 564 n. 2, 703 P.2d 502, 508 n. 2 (App.1985).

6. *See* note 2, *supra*.

We conclude the state has no jurisdiction in this case. The trial court's order dismissing the state's prosecution is affirmed.

CONTRERAS, P.J., and FIDEL, J., concur.

157 Ariz. 232

Jeffrey A. WEINER and Barbara S. Weiner, husband and wife; and Merton B. Weiner and Jean Weiner, husband and wife, Plaintiffs/Appellees/Cross-Appellants,

v.

Steven Perry ASH and Christine L. Ash, husband and wife, Defendants/Appellants/Cross-Appellees.

No. 2 CA-CV 87-0195.

Court of Appeals of Arizona, Division 2, Department B.

Jan. 21, 1988.

Reconsideration Denied March 7, 1988.

Petition and Cross-Petition for Review Denied July 6, 1988.*

In action arising out of shooting, the Superior Court, Pima County, Michael Brown, J., awarded victim and passenger in his car at time of shooting damages and ordered that defendant undergo psychiatric treatment. Parties appealed. The Court of Appeals, Livermore, P.J., held that: (1) award of damages for future emotional distress and anxiety was invalid; (2) court lacked authority to compel defendant to undergo psychiatric treatment; and (3) plaintiffs were not entitled to damages for lost profits from real estate speculation.

Affirmed in part, reversed in part, and remanded.

1. **Damages** ⇐49.10

Award to shooting victim and passenger in car he was driving at time of shooting of damages for future emotional distress and anxiety, conditioned upon defendant's failure to comply with court-ordered psychiatric treatment, was invalid as award of compensation for probable future damages.

2. **Mental Health** ⇐512

Trial court in action for civil assault lacked authority to compel defendant, who had been found not guilty of criminal assault charge by reason of insanity, to undergo psychotherapy, take medication, and undergo urinalysis, and to require posting of bond to insure defendant's compliance with court-ordered treatment. A.R.S. §§ 36-533 to 36-544.

3. **Damages** ⇐190

Shooting victim and passenger of vehicle he was driving at time of shooting were not entitled to award of damages for lost profits from real estate speculation for six to eight-month period after shooting when parties were indisposed to return to business; evidence that parties made several advantageous real estate transactions before shooting, that several other people had made advantageous transactions in months after shooting, and that parties had resources to have made similar transactions had they been disposed to do so, was speculative and insufficient to support award of damages.

Miller & Pitt by Richard L. McAnally and Eugene N. Goldsmith, Tucson, for plaintiffs/appellees/cross-appellants.

Kimble, Gothreau, Nelson & Cannon by William Kimble and Daryl A. Audilett, Tucson, for defendants/appellants/cross-appellees.

OPINION

LIVERMORE, Presiding Judge.

Defendant Steven Ash shot and wounded plaintiff Jeffrey Weiner. Plaintiff Merton

* Feldman, V.C.J., of the Supreme Court, was recused and did not participate.

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